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10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA ) No. CR 06-498-DSF  
14 Plaintiff, )  
15 v. ) GOVERNMENT'S RESPONSE TO  
16 ALEXANDER GLUZMAN, ) DEFENDANT'S SENTENCING  
17 Defendant. ) MEMORANDUM  
18 )  
19 ) Hon. Dale S. Fischer  
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1 **I. INTRODUCTION**

2 The government respectfully opposes defendant Alexander  
3 Gluzman's ("defendant") arguments for a sentence outside of the  
4 Guidelines range recommended by the government: 24-30 months.  
5 The arguments submitted by defendant in his sentencing memorandum  
6 do not support a sentence outside of that range. Moreover,  
7 although defendant requests an evidentiary hearing to resolve  
8 disputed factual matters, defendant offers no evidence whatsoever  
9 to create a factual dispute in this case. The government  
10 therefore requests that the Court impose upon defendant a low-  
11 end, Guidelines sentence of 24 months imprisonment, a three-year  
12 period of supervised release, restitution in the amount of  
13 \$32,000 (as set forth in the PSR), and a special assessment of  
14 \$200.

15 **II. THE PARTIES RESPECTFULLY REQUEST THAT THE COURT EMPLOY THE**  
16 **GUIDELINES CALCULATION SET FORTH IN THE PLEA AGREEMENT**

17 Defendant first argues that the Court should adopt the  
18 Guidelines calculation submitted by the parties in the plea  
19 agreement rather than the one calculated by the PSR. The  
20 government concurs in this request.

21 **III. THE INFRINGEMENT AMOUNT AGREED TO IN THE PLEA AGREEMENT DOES**  
22 **NOT OVERSTATE THE "AMOUNT OF LOSS" OR "SERIOUSNESS OF THE**  
23 **OFFENSE"**

24 Defendant argues that the "loss" to which the parties  
25 stipulated in the plea agreement "substantially overstates the  
26 seriousness of the offense" so as to warrant a downward  
27 departure. (Def.'s Sent. Pos. at 7-8). As with all downward  
28 departure requests under the Guidelines, defendant carries the

1 burden of establishing by a preponderance of the evidence that  
2 any Guidelines departure is warranted. United States v. Lipman,  
3 133 F.3d 726, 730 (9th Cir. 1998). Here, although the Court may  
4 downward depart where the loss guideline “substantially  
5 overstates the seriousness of the offense,” USSG § 2B1.1 comment  
6 n.18(C) (emphasis added), the government submits that defendant  
7 has failed to carry his burden that his case falls “outside of  
8 the heartland.” Indeed, he falls squarely within the conduct  
9 that USSG § 2B5.3 was designed to punish.

10 As an initial matter, because defendant engaged in an  
11 intellectual property offense, loss to the victim is not the  
12 measure by which the Sentencing Guidelines are calculated;  
13 rather, the offense level is calculated based upon “infringement  
14 amount,” see USSG § 2B5.3(b)(1), in this case the retail value of  
15 defendant’s illegal access devices and the stolen trade secret  
16 technology. Thus, defendant’s arguments about what loss was  
17 caused by his conduct and his lack of restitution obligation are  
18 irrelevant to his Sentencing Guidelines calculation.

19 In any event, the infringement amount in this case does not  
20 substantially overstate the seriousness of his offense. As  
21 defendant admitted in his guilty plea colloquy, defendant stole  
22 “enormously valuable technology” from DirecTV in this case, a  
23 technology in which DirecTV had invested in excess of \$18  
24 million. (Plea agt. at 5). He abused the access that he had as  
25 a contractor to steal 160 megabytes of proprietary and  
26 confidential DirecTV computer code relating to the devices used  
27 to encrypt DirecTV’s intellectual property. (Id. at 5-6).  
28 Defendant admitted his conduct caused \$49,321.50 in loss to

1 DirecTV. (Id. at 6). The PSR calculates the out-of-pocket loss  
 2 to DirecTV as \$32,000, but with a labor loss of \$177,812.50.  
 3 (PSR ¶ 31). Furthermore, defendant distributed and sold illegal  
 4 access devices to Dish Networks, allowing customers to steal Dish  
 5 Network programming, causing "a total loss to Dish Networks of  
 6 \$229,995." (Id. at 6-7).<sup>1</sup> The stipulated infringement amount of  
 7 greater than \$200,000 accurately represents the seriousness of  
 8 defendant's offense. The government therefore respectfully  
 9 requests that the Court employ this infringement amount when  
 10 sentencing defendant. No downward departure is warranted here.

11 **IV. SENTENCING DEFENDANT PURSUANT TO THE GUIDELINES AVOIDS**  
 12 **UNWARRANTED SENTENCING DISPARITIES**

13 Defendant next argues for a non-custodial sentence outside  
 14 of the Guidelines range based upon comparisons to other satellite  
 15 signal theft cases. Defendant has utterly failed to demonstrate  
 16 how a Guidelines range sentence of 24 months creates an  
 17 unwarranted sentencing disparity with the other signal theft  
 18 cases cited by the government.

19 Arguably, defendant's offense is far more serious than the  
 20 other cases of satellite signal theft. In most of those cases,  
 21 save Whitehead, the defendants actually reverse engineered the  
 22 access devices, or used available technology, to allow their  
 23 customers to steal satellite signal. In this case, defendant  
 24 abused his access as a contractor to steal DirecTV's 18 million

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25 <sup>1</sup> Although defendant may argue that Dish Networks did not  
 26 actually suffer this loss, even the loss Guidelines under USSG  
 27 § 2B1.1 is governed by intended loss rather than actual loss  
 28 suffered. Given the devices seized from defendant's home and his  
 practice of providing the access devices to others, there can be  
 no serious dispute that defendant is responsible for an intended  
 loss to Dish Networks of greater than \$200,000.

1 dollar technology from the source. He admitted to causing  
2 \$49,321.50 in actual damages to DirecTV. (Plea agt. at 6). In  
3 addition to his theft of trade secrets, defendant also sold  
4 illegal access devices like the other defendants against whom  
5 defendant has compared himself. A 24 month sentence in this case  
6 therefore does not create any unwarranted sentencing disparity.

7 Defendant has also failed to show that the defendants in  
8 those other cases are similarly situated to him. Although he  
9 cites some facts in each case, he does not give the Court a full  
10 picture of the facts in those cases, and any unwarranted  
11 sentencing disparity is necessarily based on a close factual  
12 comparison. In general, the government respectfully submits that  
13 imposing a Guidelines range sentence avoids unwarranted  
14 sentencing disparities because the Guidelines themselves account  
15 for the factual differences between the defendants.

16 The government also draws the Court's attention to United  
17 States v. Ramirez, CR 06-475-ABC, in which the Court imposed a 24  
18 month sentence in a case involving satellite signal theft.  
19 Although it is true that Ramirez had a criminal history greater  
20 than defendant's, Ramirez was not convicted of stealing a trade  
21 secret. Although probation with conditions was recently imposed  
22 in two additional satellite signal theft cases, United States v.  
23 Sarnoski, CR 06-744-DDP, and United States v. Kosierowski, CR 07-  
24 233-DDP, those cases are again distinguishable in that the crimes  
25 there did not involve stealing the 18 million dollar trade secret  
26 from DirecTV.

27 Therefore, the government's recommended low-end sentence of  
28 24 months is warranted and would not create unwarranted

1 sentencing disparity. Indeed, the government respectfully  
2 submits that it is variation from the Guidelines that would have  
3 the secondary effect of creating unwarranted sentencing  
4 disparity.

5 **V. DEFENDANT'S MEDICAL AILMENTS DO NOT WARRANT A DOWNWARD  
6 DEPARTURE**

7 Defendant has also failed to demonstrate that defendant's  
8 current medical condition warrants a downward departure. While  
9 not minimizing defendant's spinal meningitis and medical  
10 ailments, they simply do not rise to the level of the seriousness  
11 which Courts have found to warrant a downward departure.  
12 Defendant is 35, approximately half the age of the defendants in  
13 most of the cases cited in defendant's brief. (Def.'s Sent. Pos.  
14 At 11-12). He does not have a terminal condition, such as  
15 advanced HIV, nor does have the type of brain damage where a  
16 departure on this ground was granted. (See id.). In fact, his  
17 last serious medical episode appears to be 2004, so his current  
18 medical condition seems relatively good.

19 Rather than presenting a serious and current medical  
20 condition, defendant relies primarily on the general proposition  
21 that "[m]eningitis can cause long-term problems" and his  
22 unsupported assertions that "[n]ot all of [defendant's]  
23 medications are available in prison and can cause deterioration  
24 in Defendant's health" and that "[t]he usual Common Fare Diet  
25 available in BOP facilities is not sufficient for heart  
26 patients." (Id. at 12-13 (emphasis added)). None of this  
27 establishes that he suffers from a current medical problem so far  
28 outside the heartland that he should escape prison for his crimes

1 or that the Bureau of Prisons ("BOP") is in fact unable to  
2 accommodate defendant. The fact of the matter is, as the Court  
3 is no doubt aware, the BOP does have medical staff at their  
4 facilities and is associated with hospitals in the case of  
5 emergency. Moreover, defendant has not established that fact  
6 that the BOP could not make adjustments to accommodate defendant  
7 even if it were true that the general, or "Common Fare," BOP diet  
8 and conditions might create medical problems for defendant.

9 For the foregoing reasons, defendant has not carried his  
10 burden to demonstrate either that he has a serious medical  
11 condition warranting a downward departure or that the BOP is not  
12 capable of accommodating his condition. No departure is  
13 warranted.

14 **VI. RESTITUTION**

15 After relying on the limited restitution at issue here when  
16 arguing that the stipulated infringement amount substantially  
17 overstates the loss, defendant then argues that incarcerating him  
18 might jeopardize repayment of that restitution. Defendant's  
19 restitution amount is only \$32,000, and he earned \$53,000 in a  
20 six month period last year (PSR ¶ 106). It is extremely unlikely  
21 that incarceration will hamper defendant's ability to repay over  
22 the course of his three years of supervised release. Moreover,  
23 restitution is only one of the 3553(a) factors, and the  
24 government respectfully submits that the other factors in this  
25 case, including the advisory Guidelines, the seriousness of the  
26 offense, and the need to promote respect for the law, outweigh  
27 the need for his limited restitution to DirecTV.

1 **VII. CONCLUSION**

2 For all the foregoing reasons, defendant's departure  
3 arguments should be rejected. The factors set forth in 18 U.S.C.  
4 § 3553(a) support the imposition of sentence of 24 months  
5 incarceration (a sentence at the low-end of the applicable  
6 Guidelines range), a three-year period of supervised release,  
7 restitution in the amount of \$32,000, and a special assessment of  
8 \$200.

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10 DATED: October 29, 2007 Respectfully submitted,

11 THOMAS P. O'BRIEN  
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13 CHRISTINE C. EWELL  
14 Assistant United States Attorney  
Chief, Criminal Division

15 /s/  
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17 WESLEY L. HSU  
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20 Attorneys for Plaintiff  
United States of America

CERTIFICATE OF SERVICE

I, SUSAN M. CRUZ, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction I served a copy of: **GOVERNMENT'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM**

service was:

[ ] Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

[ ] By hand delivery  
addressed as follows:

[ ] By messenger as follows: [ ] By federal express as follows:

DANIEL A. GIBALEVICH, ESQ.

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This Certificate is executed on October 29, 2007, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is  
true and correct. 

~~STISAN M. CRUZ~~

### BOBBY W. GROB